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No.

IN THE

Supreme Court of the United States

October Term, 1984

AIRWELD, INC.,
Petitioner,

v.

AIRCO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

I.

Where acetylene is available to Airweld, a distributor of industrial gases, at lesser prices from other sources, including a plant which it desired to build, and where Airco, a manufacturer of both atmospheric gases and acetylene, is the only practicable source of atmospheric gases in the relevant geographic market, is it an unlawful tie-in for Airco to require Airweld to purchase Airco's acetylene as a condition of continued ability to purchase Airco's atmospheric gases?

II.

If so, should a jury verdict be reinstated in Airweld's favor for damages suffered on purchases of acetylene, made during the limitations period, where the unlawful condition precedent was exacted in the pre-limitations period?

III.

Where Airweld competes for sales of atmospheric gases with more favored purchasers, which obtain their gases from Airco by means of "exchange" agreements, is Section 2(a) of the Robinson-Patman Act inapplicable because the favored purchasers pay in kind rather than in cash?

IV.

In determining that Airco did not attempt to monopolize the relevant cylinder gas market, thereby contravening the finding of the jury, did the Ninth

Circuit Court of Appeals impose a standard of proof and evidentiary presumptions which are a departure from the law as promulgated by the United States Supreme Court?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Airweld, Inc. and respondent Airco, Inc.

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COURT OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 742 F.2d 1184 (1984), is set out in Appendix A to this Petition. The District Court's opinion, reported at 576 F.Supp. 676 (D.C. Or. 1983), is set out in Appendix B to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit upholding the decision of the District Court was entered on September 17, 1984. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 2101(c).

STATUES INVOLVED IN THE CASE

15 U.S.C. §§ 1 and 2 (Sherman Act); 15 U.S.C. § 13(a) (Robinson-Patman Act); 15 U.S.C. § 14 (Clayton Act). See Appendix C.

CONCISE STATEMENT OF THE CASE

Airweld filed suit December 7, 1979, alleging various violations of the antitrust laws of the United States by Airco. Jurisdiction was conferred on the District Court pursuant to 15 U.S.C. §§ 15, 22 and 26; and 28 U.S.C. § 1337.

Prior to April 1, 1976, Airweld was an independent distributor of industrial gases for Airco in Portland, Oregon. The first agreement between the parties, for a five year term, was entered into in 1968. A "renewal" contract, negotiated in late 1972 - early 1973, was entered into effective April 1, 1973 and was, in effect, for a three year term.

One of the gases that Airco supplied to Airweld was acetylene. Due to the high price imposed by Airco for supply of this gas, Airweld became interested in an alternative source for the product. Airweld investigated the possibility of obtaining a new supplier, as well as the possibility of building its own acetylene plant.

For four months in 1969, Airweld purchased acetylene from an alternative supplier at a substantial savings. Because of threats from Airco, however, Airweld discontinued this practice.

Subsequent thereto, as Airweld became more interested in the construction of its own acetylene plant, it was consistently told by representatives of Airco that if it constructed such a facility, the result would be cancellation of Airweld's Airco distributorship. As a result of these threats, Airweld had no choice but to forgo construction of an acetylene plant because there was no alternative supplier of the other industrial gases furnished to Airweld by Airco.

Airweld also purchased from Airco bulk atmospheric gases (oxygen, nitrogen, argon), which in turn were sold

to accounts in bulk. In so doing, Airweld competed with gas manufacturers, competitors of Airco, which received their bulk gas in Portland also from Airco. The "price" paid by these manufacturers for these bulk gases was comparable product furnished to Airco in other markets. A settlement price was associated with these "swap" agreements to correct any imbalances. Because Airweld purchased these bulk gases from Airco at prices far in excess of the prices paid its competitors, Airweld was unable to compete with these manufacturers for the so-called large bulk accounts.

In April 1975, Airweld notified Airco of its intent not to renew the distributorship contract, and one year later the parties ceased to do business. In response, Airco established Airco Welding Supply, an Airco-owned distributorship.

Airco began "targeting" Airweld customers before the formation of Airco Welding Supply. Further, Airco approached another distributor about becoming an Airco distributor, and attempted business "blackmail" in these efforts to induce this other distributor. When Airco Welding Supply was established, it focused its marketing program on Airweld customers; and its sales personnel called on the majority of Airweld's customers, to the exclusion of other accounts in the Portland market. The prices offered to these Airweld customers were below the average total cost of the product to Airco Welding Supply.

The lawsuit was tried before a jury which reached a verdict on March 1, 1982. By special interrogatories, the jury found that Airweld had proven each element of the various claims, save one. On March 23, 1982, the District Court ordered partial judgment on the jury verdict in the amount of $379,933.00.

On January 11, 1983, judgment n.o.v. as to all claims was granted (Appendix B). By order dated March 22, 1983, the District Court conditionally granted a new trial.

In its decision of September 17, 1984, the United States Court of Appeals for the Ninth Circuit upheld the decision of the District Court in all respects. (Appendix A).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Introduction

By its rationale that Airweld's proof is insufficient because it failed to show that Airco "... had a corner on the atmospheric gas market in Portland," the Ninth Circuit has required a standard of proof which is greater than any required by applicable decisions of this Court.

By its holding that Airweld may not recover for damages on purchases of acetylene made during the limitations period because the contract pursuant to which the purchases were made was lawful on its face, despite the fact that the unlawful tie-in was exacted prior to and as a condition of entry into the contract, the ninth Circuit is in conflict with other federal courts of appeal and with applicable decisions of this Court.

With respect to whether "exchange" agreements are subject to the price discrimination provisions of the Robinson-Patman Act, this is a question of first impression. Because "exchange" agreements are reasonably prevalent in American industry and because the holding of the Ninth Circuit creates a glaring loop hole in the protections afforded to competition by the antitrust laws, resolution of this question is in the public interest.

Similarly, by applying in this case its own version of the "Areeda-Turner" predatory pricing test, the Ninth Circuit has perpetuated and increased the confusion and conflict among the circuit and district courts arising out of use of this mechanistic standard and has joined those circuits which use a standard of proof in attempted monopoly cases which is at odds with the standards set forth in decisions of this Court.

In its treatment of each of the antitrust claims of Airweld, the Ninth Circuit has fragmented the applicable evidence and viewed each fragment in a vacuum. It then interpreted the evidence in a manner different than the interpretation necessarily attached to it by the jury. The actions of the Ninth Circuit and the interests of justice suggest that it would be appropriate for this Court to exercise its supervisory authority to reinstate the verdict of the jury.

B. Argument

1. It Was Unlawful For Airco To Require Airweld To Purchase Airco's Acetylene As A Condition Of Airweld's Continued Ability To Purchase Atmospheric Gases.

(a) Background Facts.

The evidence introduced at trial shows that in 1972-73 there were three suppliers of atmospheric gases in the Portland market: respondent Airco, which had a manufacturing plant; Liquid Air, which had a small plant but was required to obtain gases from Airco to supply its own customers; and Linde, which obtained from Airco all of its gases for its customers. Prior to entering into the 1973 contract with Airco, Airweld was told by Liquid Air that it would not supply Airweld's needs for atmospheric gases. Linde had a nation-wide policy against allowing its distributors to engage in the

resale of gases in bulk, which was a very significant portion of petitioner's business, and thus was not a viable alternative. Because of high transportation costs, Airweld could not bring in gases from outside the area.

Thus, in order to stay in the business of distributing industrial gases when its supply contract expired, Airweld's only practicable choice was to negotiate a new contract with its current supplier, respondent Airco. Although the new contract was, indeed, lawful on its face, it included purchase of acetylene from Airco only because Airweld had been told on numerous occasions, including during negotiation of the new contract, that it could not supply itself with acetylene (at significantly less cost) by building its own acetylene plant and still retain the right to purchase the other gases from Airco.

In reaching its conclusion that petitioner failed to demonstrate the existence of an unlawful tie-in, the Ninth Circuit relied upon two rationale:

> (1) That because petitioner's purchases of acetylene were made pursuant to a contract which in and of itself did not express an unlawful tie between the products, then petitioner's purchases were "voluntary conduct" negating the existence of coercion;
>
> (2) That petitioner did "... not prove that Airco had a corner on the atmospheric gas market in Portland."[1]

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1. On the question of whether or not Airco had market power in the tying products (atmospheric gases) at the time the contract was entered into, the Ninth Circuit confuses the issue by referring to the fact that after petititoner Airweld had notified respondent Airco that it would not renew the contract, three years later, other suppliers did offer to supply atmospheric gases. Although the Ninth Circuit says that this is indicative of supplier competition in the Portland market, it seems elemental that the situation three years later sheds no light on the situation which obtained immediately before the contract was signed or during its life.

(b) A Contract Lawful On Its Face Is Unlawful When It Is Part Of An Unlawful Scheme.

With respect to the first rationale, petititioner respectfully submits that the correct standard is set forth by the Fifth Circuit in *Imperial Point Condominiums* v. *Mangurian*, 549 F.2d 1029, 1041 (5th Cir. 1977), following an extensive review of pertinent authorities. *Mangurian* involved a contract which was "the facially lawful product" of unlawful activity (549 F.2d at 1043).

> The cases [analyzed in the decision] are consistent with *Zenith [Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971)] and *Poster Exchange* [v. *National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975)], in that accrual of a plaintiff's cause of action is based on injurious acts committed by the defendant within the limitations period. It also seems reasonable to us not to permit a defendant to argue that a suit to recover damages caused by his recent acts is barred because a pre-limitations contract between himself and plaintiff, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts. Such defendants hardly are in a position to argue for the protection of the statue of limitations on the traditional ground that "evidence has been lost, memories faded, and witnesses have disappeared, . . ." [citations omitted], when it is defendant's own recent conduct that results in a finding of a newly accruing cause of action. *See Hanover Shoe, supra*, 392 U.S. at 502 n. 15, 88 S.Ct. 2224.

The Ninth Circuit rationale, pinned as it is to the facial lawfulness of the contract, is incorrect. It makes a non-existent distinction between a contract unlawful on its face, such as was present in its own case in *Twin Cities Sports Service* v. *Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), and one which is lawful on its face but entered into on an unlawful condition, such as

Mangurian. Both are equally unlawful. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809; 66 S.Ct. 1125, 90 Law. Ed. 1575 (1945).

(c) It is Not A Requirement Of Section 1 Of The Sherman Act, Or Of Section 3 of The Clayton Act, That Respondent Have A Monopoly Position In, Or "A Corner On," The Tying Product.

With respect to the rationale that petitioner did "... not prove that Airco had a corner on the atmospheric gas market in Portland," no such requirement is to be found in the decisions of this Court.

This Court has consistently held that a tying arrangement violates Section 3 of the Clayton Act *either* if the seller has sufficient economic power in the market for the tying product to appreciably restrain competition in the market for the tied product *or* if a not insubstantial volume of commerce in the market for the tied product is restrained. *Fortner Enterprises* v. *United States Steel Corp.* ["Fortner I"], 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). And, if both factors are present, such an arrangement also violates Section 1 of the Sherman Act. *Id., United States* v. *Loews, Inc.,* 371 U.S. 38, 45; 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 11; 78 S.Ct. 514; 2 L.Ed.2d 545 (1958); *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 608-609; 73 S.Ct. 872; 97 Law Ed. 1227 (1953).

> ... We have condemned tying arrangements when the seller has some special ability — usually called "market power" — to force a purchaser to do something that he would not do in a competititve market. *Jefferson Parish Hosp. District No. 2* v. *Hyde,* 80 L.Ed.2d 2, 14; ___ U.S. ___; 104 S.Ct. ___ (1984).

Respondent Airco did not have a "corner" on the atmospheric gas supply in Portland; there were two other suppliers.

However, in view of the established facts, respondent Airco did have the requisite "special ability" or "leverage" to force petitioner Airweld to purchase from it the tied product acetylene. Using that "special ability," respondent Airco prevented petitioner Airweld from building its own acetylene plant,[2] thereby appreciably restraining competition in the market for acetylene. Using that "special ability" respondent Airco secured to itself the acetylene business of petitioner Airweld (23,000,000 cubic feet costing more than $750,000 during the damage period) — a not insubstantial amount of commerce.

2. The Jury Verdict In Petitioner's Favor, For Damages On Purchases Of Acetylene During The Limitations Period, Should Be Reinstated.

Assuming, arguendo, that there were no "acts of coercion" during the limitations period, petititoner advanced below two theories permitting it to recover damages for injuries suffered during the limitations period as a result of pre-period conduct. These are:

(a) That there was a continuing violation of the antitrust laws through the limitations period; or

(b) That the "Zenith exception," relating to speculative damages, was applicable.

The pertinent facts are: the 1973 contract was entered into on the condition that petitioner Airweld

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2. Testimony established that respondent Airco did so for the express purpose of keeping a competitive supplier of acetylene out of the marketplace.

not build its own acetylene plant or purchase its requirements for acetylene from other than respondent Airco; however, the contract did not establish any quantity to be purchased and the price, beyond the first year, was at the discretion of Airco; from time to time Airweld purchased varying quantities of acetylene to meet its needs, which changed over time; during the second and third years of the contract, Airco from time to time increased its price for acetylene.

That there was a continuing violation of the antitrust laws seems unmistakably clear: throughout the contract period, Airweld was required to refrain from building its acetylene plant in order to retain its supply of atmospheric gases; throughout the period, petitioner paid a price for acetylene in excess of that which would otherwise have been available; each purchase of acetylene at the inflated price invaded petitioner's right to buy at a competitive price; and, the unlawful contract was "actively enforced" not only with each purchase but also with each price increase.

The Ninth Circuit rationale, however, was that the contract was lawful and that, therefore, petitioner's purchases under the contract could not have been forced. As stated above, the contract was unlawful because of the unlawful condition precedent.[3]

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321; 91 S.Ct. 795, 28 L.ed.2d 552 (1971), provides the alternative support for the jury's verdict. That case holds that injury is not complete, and the statute of limitations does not begin to run, until the amount of

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3. Contrary to the Ninth Circuit assertion that "the parties agree that the contracts entered into are not illegal," petitioner Airweld has steadfastly maintained throughout these proceedings that although the contract was lawful on its face, it was an unlawful contract because of the unlawful condition.

damages suffered can be measured with the requisite precision.[4] 401 U.S. at 339-340.

The Ninth Circuit's treatment of petitioner's argument under this exception is brief, and confusing:

> Airweld also argues that the speculative damage exception to the general rule of accrual applies. Assuming that Airweld offered sufficient proof of a tying arrangement imposed prior to 1973, it nonetheless is only entitled to damages for injury incurred during the claims period, May 1973 to May 1977 . . . [Citation omitted] . . . If, as Airweld claims, it was injured with each purchase of acetylene, that injury was certainly complete when all the purchases of acetylene under the first agreement were consummated. That apparently would have been no later than April 1, 1973, when the second agreement went into effect. Airweld offered no proof that purchases of acetylene under the first agreement occurred after that time.

The foregoing makes sense only if it is true that the second contract, despite the fact that it was entered into on an unlawful condition, was lawful and that, therefore, the anti-competitive effects of respondent Airco's conditions were terminated by entry into the second contract.

3. Section 2(a) Of The Robinson-Patman Act Does Not Require That Price Be Paid In Cash; Transactions Involving Payment In Kind Are Nonetheless Sales And Subject To The Statute.

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4. Because both quantity and price of acetylene are not established in the contract, damages could not be ascertained until the time of each purchase of a definite quantity at a specified price. Further, even at the time of each purchase, a "competitive base price" could not be calculated for market conditions which were prevented from occurring by the unlawful contract; i.e., the entry of petitioner as a competitive manufacturer of acetylene in a market with excess capacity.

The question of whether or not exchange agreements of the type here involved are "sales" involving a "price" is apparently one of first impression in this Court.

The Ninth Circuit, and the district court, rely on *American Oil Co.* v. *McMullin*, 508 F.2d 1345 (10th Cir. 1975) for the proposition that exchanges are not "sales."

However, no such holding was made in that case. There was no allegation or showing that the "prices" available to the favored purchasers were passed on to that distributive level at which the plaintiff competed; plaintiff's claim failed not because the transactions were not sales, but because he did not compete or potentially compete with the recipients of the favoritism. 508 F.2d at 1345.

In the instant case, however, the evidence establishes that petition Airweld was in direct competition at all times with Linde and Liquid Air, the recipients of the more favorable treatment.

The only evidence on the question of whether these transactions are "sales" was offered by petitioner's expert, who testified that ". . . money serves only as a medium of exchange. You can exchange merchandise just as well and still have a sale."

After hearing all of the evidence, and presumably reviewing the documents relevant to the issue (which included the exchange agreements themselves and memos concerning them) the jury affirmatively answered the question, "Has the plaintiff proved that the exchange agreements with [Linde and Liquid Air] were sales?"

Therefore, if the question is treated as one of motive and intent, the jury verdict must be reinstated.

If the question is treated as one of statutory construction, then plaintiff must be given the benefit of the axiom of statutory construction that words in statutes must be given their ordinary and common meaning unless otherwise required by their context.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides: "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . ." There is nothing in the context which requires an extraordinary meaning of the word "price."

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED defines "price":

> 1: *Archaic:* genuine and inherent value: WORTH, EXCELLENCE, PRECIOUSNESS . . . 2a: The quantity of one thing that is exchanged or demanded in barter or sale for another: a ratio at which commodities and services are exchanged. 2b: The amount of money given or set as the amount to be given in consideration for the sale of a specified thing. 3. The terms or considerations for . . . which something is done or undertaken . . .

The same source defines "sale":

> 1: The act of selling: a contract transferring . . . ownership of property from one . . . to another for a price (as a sum of money or any other consideration); specif.: a present transfer of such ownership . . . to all of or a part interest in personal property . . . under a contract by the seller to the buyer for a price paid or payable in money or other personal property — distinguished from gift . . .

The first, and preferable, meaning of each of these words requires the word "price," as used in Section 2(a) of the Robinson-Patman Act, to be construed to include situations where consideration is paid in kind.

As an alternative to its holding that the transactions involved were not "sales," the Ninth Circuit held that

petitioner Airweld "... never proved when the sales actually occurred and therefore that they were contemporaneous to its purchases."

On the contrary, petitioner Airweld proved that it was in competition with Liquid Air and Linde at all times and that the source of the gas being offered by Linde and Liquid Air was, at all times, respondent Airco. Therefore, the transactions with Linde and Liquid Air were necessarily continuous and contemporaneous with Airweld's purchases.

As a further bolster for its position that petitioner Airweld was not injured by the transactions in question, the Ninth Circuit engaged in the rankest of speculation that because Airweld was not a manufacturer, "... it simply was in no position to swap." There is no evidence in the record whatsoever on this issue. It is just as fair to speculate that petitioner could have purchased gas in another geographic area with which it could engage in "swap" transactions with respondent Airco in the Portland market.

In conclusion, Section 2(a) of the Robinson-Patman Act does not exempt transactions in kind from its coverage. Indeed, a reading of 15 U.S.C. § 13 in its entirety serves to convince that Congress intended to plug all of the loop holes by which ingenious industrialists might attempt to find a way to discriminate in price: Equally forbidden are unearned "commissions," unequal compensation or consideration for services or facilities provided by buyers, proportionately unequal processing or handling fees, unequal trade-in allowances or advertising allowances, etc.

4. *By Its Determination That Airco Did Not Attempt To Monopolize The Relevant Cylinder Gas Market, The Ninth Circuit Imposed A Standard Of Proof And Evidentiary Presumptions Which Are A Departure From The Law As Promulgated By This Court.*

In an attempt to monopolize claim (15 U.S.C. § 2), there are three interrelated elements: (1) a specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose and (3) a dangerous probability of success. *William Inglis & Sons Baking Co.* v. *ITT Continental*, 668 F.2d 1014 (9th Cir.), *cert. denied*, 459 U.S. 839 (1982).

Airweld presented substantial evidence of each of these three elements of attempted monopolization, resulting in a jury verdict for the full amount of the claim. However, the District Court granted judgment n.o.v. on the basis of a mechanistic evidentiary test which radically alters the requisite burden of proof upon the plaintiff. The Ninth Circuit, in upholding the District Court's decision, accepted that court's adoption of the so-called Areeda-Turner test, as modified by the Ninth Circuit in *Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377, 1384-1385 (9th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 370 (1983).

Airweld presented evidence that prices offered by Airco Welding Supply ("AWS"), the Airco-owned distributorship, to Airweld customers were below average total cost to AWS. The Ninth Circuit ruled that in such circumstances, "the burden remains on the plaintiff to otherwise show the predatory nature of the pricing. *Id.* at 1036. This can be done if the evidence shows 'that the defendant sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff.' " The Court of Appeals then dismissed Airweld's other evidence of Airco's predation as insubstantial.

Other circuits have adopted additional permutations of the Areeda-Turner test for predatory pricing. In *Barry Wright Corp.* v. *ITT Grinnell,* 724 F.2d 227 (1st Cir. 1983), the First Circuit refused to follow the Ninth Circuit's version of the Areeda-Turner test for determining predatory pricing: "... we conclude that the Sherman Act does not make unlawful prices that exceed both incremental and average costs." 724 F.2d at 236. The Sixth Circuit also rejected the modified Areeda-Turner test of the Ninth Circuit in *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.,* 729 F.2d 1050 (6th Cir. 1984).

Other circuits have appeared to adopt the original Areeda-Turner test in its entirety. See *MCI Communications* v. *American Tel & Tel Co.,* 708 F.2d 1081 (7th Cir.) *cert. denied,* ___ U.S. ___, 104 S.Ct. 234 (1984).

Despite the popularity of the Areeda-Turner test in original or modified form, the Supreme Court has not spoken on the entire issue of predatory pricing except to note a firm's below cost pricing in a price discrimination case. *Utah Pie Co.* v. *Continental Baking Co.* ("Utah Pie"), 386 U.S. 685, 698-99, 87 S.Ct. 1326, 1333-1334, 18 L.Ed.2d 406 (1967). In overruling the Court of Appeals' decision that there was no competitive injury, this Court stated: "It [Continental] was then selling the same pies at substantially higher prices in other markets. The Salt Lake City price (for pies) was less than its direct cost plus an allocation for overhead." 386 U.S. at 698.

The United States Supreme Court also addressed the issue of below cost pricing in *FTC* v. *Anheuser-Busch, Inc.* ("Anheuser-Busch"), 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960), in which it stated that, "... a price reduction below cost tends to establish such an [predatory] intent." 363 U.S. at 552.

The United States Supreme Court has not adopted any form of the Areeda-Turner test, which substantially changes the standards promulgated by this Court in *Utah Pie* and *Anheuser-Busch*. Airweld urges this Court to refute the Areeda-Turner test in any of its myriad forms, and end the pointless confusion and obfuscation of the lower courts in their continued inconsistent attempts to employ the faulty analysis. If the standards of *Utah Pie* and *Anheuser-Busch* are the appropriate measurements for determining attempted monopoly in predatory pricing cases, then there can be no dispute that Airweld presented substantial evidence of all the elements of a Sherman Act Section 2 violation.

CONCLUSION

Petitioner's pray that a Writ of Certiorari issue from this Court to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 17, 1984.

RESPECTFULLY SUBMITTED this 13th day of December, 1984.

FERGUSON & BURDELL

By: C. David Sheppard
David R. Lord
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIRWELD, INC.,	)	
	)	
Plaintiff-Appellant,	)	NO. 83-3625
	)	
vs.	)	D.C. NO.
	)	CV 80-356 RE
AIRCO, INC.,	)	
	)	
Defendant-Appellee.	)	OPINION
	)	

On Appeal from the
United States District Court
for the District of Oregon
The Honorable James A. Redden,
Presiding
Argued and Submitted
June 5, 1984

Before: ANDERSON, POOLE, and NELSON,
Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

Airweld, Inc., a distributor of industrial gases, brought an action against Airco, Inc., a manufacturer of industrials gases, alleging a variety of antitrust violations including price discrimination, attempted monopolization, and tying arrangements. After a jury trial, the district court granted Airco's

motion for judgment notwithstanding the verdict (j.n.o.v.) 576 F.Supp. 676 (D.Or. 1983). Airweld appeals.

I. BACKGROUND

A. Facts.

This action involves the industrial gas market in the Portland, Oregon area. Industrial gases are often divided into two types: "atmospheric" gases, such as hydrogen, oxygen, nitrogen, helium and argon; and "fuel" gases, such as acetylene and propane. Atmospheric gases are extracted from the atmosphere and generally fuel gases are produced through combining various elements or compounds. Industrial gases are generally sold in two forms. They are compressed into cylinders for resale by distributors and they are also sold in bulk, sometimes in liquid form, to larger industrial buyers.

In 1968, Stanton Richardson, who had been employed by Airco for 23 years, purchased Industrial Specialties Co.

("ISCO"), an industrial gas and welding products distributor in Portland, Oregon. ISCO, now known as Airweld, Inc., had been a distributor of Airco, Inc. products since at least the early 1960's. Airco was, and apparently still is, one of the major manufacturers of industrial gas and welding products in this country. It has an acetylene plant in Portland and manufactures atmospheric gases in nearby Vancouver, Washington.

After Richardson's purchase, Airweld and Airco entered into a new distributorship agreement. The contract had a five-year term, but was terminable by either party upon one year's notice. At this time, Airweld became the sole distributor of Airco products in Portland and Airco ceased acting as its own distributor in that locale.

In 1973, a new three-year agreement was executed. Soon, however, Airweld became unhappy with Airco's price

increases in argon and, on or before April 1, 1975, Airweld gave notice of its intent to terminate the atmospheric gas portion of the agreement. Negotiations to reconcile the differences failed and on March 31, 1976, the entire Airweld-Airco relationship ended.

1. Tying Claim Facts.

In 1969, Airweld began to purchase acetylene from another manufacturer. When Airco learned of this, it told Richardson, Airweld's president, that it would terminate the agreement if outside purchases of acetylene continued. Airweld then resumed buying the gas from Airco. Airweld allegedly acquiesced because it did not feel it could economically secure another source for atmospheric gases at economically feasible prices.

From 1969 to 1971, Rexarc, a manufacturer of acetylene plants, encouraged Richardson to build his own plant. Richardson was interested in this prospect

because Rexarc was convinced that Airweld would save substantially on the cost of acetylene. Airco indicated to Richardson, however, that Airweld could not remain a distributor if it built its own plant. Airweld continued purchasing its acetylene requirements from Airco until the agreement terminated in 1976.

2. Price Discrimination Facts.

Airweld's price discrimination claim involves agreements that Airco had with the Linde Division of Union Carbide Corp. and Liquid Air, Inc., two of the other major manufacturers of industrial gases in this country. Since at least 1968, Airco and Linde had a formal agreement to "swap" atmospheric gases on a national basis. For example, Linde did not have an atmospheric gas manufacturing plant in the Portland area prior to at least 1976. Airco would supply Linde with these gases from its Vancouver, Washington facility, and Linde made its gases available to

Airco at its Indiana facility. Gas was traded only as available. Imbalances in the amount respectively received were to be kept within 50 million cubic feet, and only on a short-term basis. Originally, imbalances were to be remedied solely through the provision of product. This changed, and in July 1974 through April 1976, "settlement values" were to be used. The settlement value was a trade price set for the particular gas.

In 1973, a similar, although less formal, agreement was entered between Airco and Liquid Air in which Airco agreed to supply Liquid Air with gas from Vancouver and Liquid Air made its gases produced in Phoenix available to Airco. Imbalances over one million cubic feet were to be rectified by use of a settlement price of $.080 per cubic foot.

Linde and Liquid Air each sold the atmospheric gases they received from Airco in the swaps in bulk to industrial users

as well as to distributors in cylinder form. Airweld competed with Linde and Liquid Air to some extent in the bulk user market.

3. Attempt to Monopolize Facts.

After Airweld terminated the distribution agreement, Airco decided to establish its own distributor in the Portland area, called Airco Welding Supply ("AWS"). Airco invested $400,000 to $500,000 in this operation. Since Airco was without any cylinder gas and hard goods customers in Portland after Richardson terminated the distribution agreement, AWS attempted to attract these customers back to using Airco products. It did this by approaching Airweld customers and offering lower prices. The evidence showed that at least some of the prices quoted by AWS were below its average total cost.

Airco also sought to obtain A&A Welding Supply, owned by Al Fick, as an Airco hard goods distributor for the

Portland area. A&A was a relatively small distributor and it rejected Airco's proposals. Fick testified that Airco officials stated they were going to regain the market share lost when Airweld terminated the agreement. He also stated that Airco, through AWS, targeted his customers and offered them lower prices because he declined to become an Airco distributor.

Airweld also presented evidence that in the early 1970's, Airco encouraged it to distribute argon to "small bulk" customers. To service this need, Airweld invested in "stations" from which to supply the small bulk user. Airweld grew rapidly in this market and it became one of the most important facets of its business. By 1975, Airweld had begun to compete to some extent with Airco's bulk gas supplier in Portland, Airco Industrial Gases. Around that same time, Airco raised its prices on argon and this ultimately was the major reason Airweld

decided to terminate the relationship. Richardson claimed that Airco was "squeezing" him out of the bulk argon business in the hope of taking over the accounts he had secured.

B. Procedure.

Airweld filed this action on December 10, 1979. On August 12, 1980, the district court denied Airco's motion to dismiss the complaint based on the four-year statute of limitations, 15 U.S.C. § 15b, ruling that the limitations period was tolled by a Federal Trade Commission proceeding against Airco instituted on May 19, 1977. Thus, the claims period was extended through May 19, 1973.

Airco's motion for summary judgment was denied on December 29, 1981, and the case proceeded to a two-week trial in February, 1982. A directed verdict by Airco at the close of plaintiff's evidence was denied. Airco elected not to present any evidence. On March 1, 1982, the jury

returned special verdicts in favor of Airweld, finding that Airco had unlawfully engaged in a tying arrangement, price discrimination, and in an attempt to monopolize a portion of the industrial gas market. Judgment, with damages of $1,139,799 after trebling, was entered accordingly.

Airco then moved for judgment notwithstanding the verdict (j.n.o.v.) and/or a new trial. The j.n.o.v. was granted and the trial court also conditionally granted the new trial. Airweld appeals.

II. STANDARD OF REVIEW

Our standard for determining the propriety of granting j.n.o.v. is the same as that used by the district court.[1] See California Computer Products v. I.B.M. Corp., 613 F.2d 727, 734 (9th Cir. 1979).

> [W]e must affirm the district court, if without accounting for the credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in a light most favorable to the non-moving

> party, can support only one reasonable conclusion -- that the moving party is entitled to judgment notwithstanding the adverse verdict. Neither the district court nor this court is free to weigh the evidence or reach a result that it finds more reasonable as long as the jury's verdict is supported by substantial evidence.

William Inglis & Sons Baking Co v. ITT Continental Baking Co., 668 F.2d 1014, 1026 (9th Cir. 1981) (citations omitted), cert. denied, 459 U.S. 829 (1982). Substantial evidence is more than a scintilla; it is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 853 n.2 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

III. THE TYING ARRANGEMENT[2]

A tying arrangement occurs when "a seller refuses to sell one product (the tying product) unless the buyer also purchases another (the tied product)." Roberts v. Elaine Powers Figure Salons,

Inc., 708 F.2d 1476, 1478-79 (9th Cir. 1983). Three primary elements establish a per se illegal tying arrangement:

> (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a not insubstantial volume of commerce in the tied product market.

Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1407 (9th Cir. 1984) (citing Elaine Powers, 708 F.2d at 1479); see Jefferson Parish Hospital District No. 2 v. Hyde, ____ U.S. ____, 104 S.Ct. 1551, 1557-1561 (1984).

The courts have identified two other independent, but related, elements. First, the seller of the tying product must have an economic interest in the sale of the tied product. Second, there must be a showing that the seller of the tying product "coerced" to some extent the purchaser into buying the tied product.

"Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes." Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977). It may be shown directly through evidence that the purchaser was actually coerced, or indirectly "from a showing that an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market." Id. (citation omitted).

The district court granted Airco's motion for j.n.o.v. because there was no "substantial evidence of a tie during the limitations period." 576 F.Supp. at 678. The court reached this result despite its conclusion that Airweld offered substantial evidence of a tying arrangement during the late 1960's. What the court found lacking was evidence that during the claims period Airco coerced Airweld into purchasing acetylene because of its

threats to discontinue supplying atmospheric gases. Not only must a defendant seek to require purchase of the tied item, it must have the power to do so. Hyde, 104 S.Ct. at 1558.

The gist of the district court's reasoning is that Airweld failed to prove a continuing antitrust violation. There is a four-year statute of limitations for antitrust claims. 15 U.S.C. § 15(b). This action was filed on December 10, 1979. The district court ruled prior to trial that the four-year period was tolled by a Federal Trade Commission action against Airco, which extended the limitations period to May 19, 1973. The evidence showed that Airweld's tying claim accrued prior to May, 1973; Airco attempted to dissuade Airweld in the late 1960's and the early 1970's from either securing an alternative supply of acetylene or building its own plant. The court found, however, that no overt acts designed to

enforce the tie occurred during the relevant portion of the claims period.

As a general rule, a cause of action accrues when a defendant commits an act that injures the plaintiff. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971); In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979). Since Airweld's tying cause of action first accrued under these general principles prior to the beginning of the limitations period, it had to rely on one of two doctrines. First, and primarily, Airweld argues that the continuing violation exception to the general rule of accrual applies. Second, Airweld relies on the related rule that a cause of action does not accrue on the date of injury if damages are speculative. Id.

The effect of a continuing violation is to restart the statute of limitations. In the context of a conspiracy to violate

Section 1 of the Sherman Act, the cause of action will begin to run anew whenever the defendant commits an overt act in furtherance of the conspiracy. See Zenith Radio Corp., 401 U.S. at 338. The cause of action may also reaccrue, in the absence of a conspiracy to violate the antitrust laws, when the defendant commits an act which by its nature is a continuing antitrust violation. Kaiser Aluminum, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). An example of this latter type of continuing violation is when a defendant actively enforces an illegal contract. Aurora Enterprises, Inc. v. National Broadcasting Co., 688 F.2d 689, 694 (9th Cir. 1982) (citing Twin Cities Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)).

Importantly, for the cause of action to reaccrue Airweld was required to show

Airco committed acts which not only caused it injury but also caused antitrust injury during the limitations period. National Souvenir Center v. Historic Figures, Inc., 728 F.2d 503, 509 (D.C. 1984); Kaiser, 677 F.2d at 1055; Electroglas, Inc. v. Dynatex Corp., 497 F.Supp. 97, 105 (N.D.Cal. 1980). In the context of a tying arrangement, competitive injury is presumed when the elements discussed above are shown. See Hyde, 104 S.Ct. at 1556. Therefore, Airweld was required to show that Airco had the ability and actually did enforce the tie of acetylene to atmospheric gases during the claims period.

The parties agree that the contracts entered into are not illegal. The 1973 agreement involved requirements contracts for oxygen and acetylene in cylinders, and also provided for the supply of liquid argon, oxygen and nitrogen in bulk. In and of themselves, the contracts did not tie the sale of acetylene to the allegedly

unique or desirable atmospheric gases. Therefore, Airweld's argument that it was injured and its cause of action accrued with each purchase of acetylene avails it nothing. Purchases under a legal contract do not constitute a "seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Hyde, 104 S.Ct. at 1558. Certainly, the parties' voluntary conduct pursuant to the contracts does not involved "active enforcement of an illegal contract." Aurora Enterprises, 688 F.2d at 694.

Airweld also argues that, based on Airco's pre-limitations period discouragement of Airweld's attempt to secure another source of acetylene, the jury could have inferred that it was coerced during the claim period. Again we disagree. While the district court focused

on lack of evidence of acts of coercion during the claims period, what we find most critical is Airweld's failure to offer sufficient proof of Airco's ability to force Airweld to purchase its acetylene during the claims period. Coercion takes place in the context of power in the tying product market, not in a vacuum. Hyde, 104 S.Ct. at 1560-1561; see Robert's Waikiki, 732 F.2d at 1407. The record is virtually devoid of any evidence from which the jury could have found that Airco's posture in the atmospheric gas market in Portland was such that it could require Airweld to purchase its acetylene. All the record shows is Richardson's equivocal statements that prior to 1973 Airco was the only supplier that he felt could economically provide atmospheric gases to Airweld in Portland. In particular, he stated that in 1969, Liquid Air, one of the two other manufacturers operating in Portland, probably could not have

supplied him because Liquid Air was already buying some of its own supplies from Airco. He also stated that prior to 1973, Liquid Air indicated it would not be able to supply him. Finally, he testified that after he terminated the agreements with Airco in April 1975, he had not yet checked to see if alternative manufacturers would supply him. After the termination notice, he stated that Linde and, initially, Liquid Air indicated they would not be able to supply a full line of atmospheric gases. Air Products, another manufacturer, did, however, agree to replace Airco as Airweld's argon source. Soon, Liquid Air offered a full line of industrial gas to Airweld.

This evidence does not prove that Airco had a corner on the atmospheric gas market in Portland. For the jury to have concluded that it did was mere speculation, and the trial court was obligated not to sustain its finding. In fact, the

evidence shows the atmospheric gas market in Portland was competitive. Once Airweld cut its ties to Airco, the other suppliers became available when they learned Airweld was now a serious customer.

Even assuming that Airco threatened to terminate the distribution agreement during the claims period does not, then, show that it forced Airweld into purchasing acetylene. A unilateral refusal to deal is not violative of the antitrust laws. Monsanto Co. v. Spray-Rite Service Corp., ____ U.S. ____, 104 S.Ct. 1464, 1469 (1984). Airweld's evidence showed nothing more.

Airweld also argues that the speculative damage exception to the general rule of accrual applies. Assuming that Airweld offered sufficient proof of a tying arrangement imposed prior to 1973, it nonetheless is only entitled to damages for injury incurred during the claims period, May 1973 to May 1977. Hanson v.

Shell Oil Co., 541 F.2d 1352, 1361 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). If, as Airweld claims, it was injured with each purchase of acetylene, that injury was certainly complete when all the purchases of acetylene under the first agreement were consummated. That apparently would have been no later than April 1, 1973, when the second agreement went into effect. Airweld offered no proof that purchases of acetylene under the first agreement occurred after that time. In conclusion, we affirm the district court's j.n.o.v. on this claim.[3]

IV. PRICE DISCRIMINATION

The district court also granted Airco's motion for j.n.o.v. on the price discrimination claim. Airweld had alleged that Airco's swaps of industrial gases with Linde and Liquid Air violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13, which prohibits discrimination "in price between different purchasers of

commodities of like grade and quality." See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 547 (9th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 1315 (1984). A key requirement for a Robinson-Patman Section 2(a) claim is a showing that there have been at least two completed, substantially contemporaneous sales by the same seller. Id.; see Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755 (1947); Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir. 1975).

The district court ruled that as a matter of law the swaps were not sales. In reaching its decision, it relied on the only decision of which we are aware that has held that exchanges of the same product are not sales within the ambit of the Robinson-Patman Act, American Oil Co. v McMulling, 508 F.2d 1345, 1353 (10th Cir. 1975). In McMullin, the Tenth Circuit rejected the argument that an

exchange of like types of gasoline between petroleum manufacturers constituted a sale, at least on the record before it. Nor can we, on this record, conclude that the exchange of fungible atmospheric gases by manufacturers are "sales."

Also, we agree with the district court's alternative holding that even if there were "sales," Airweld never actually proved discrimination in price. Airweld never proved when the sales actually occurred and therefore that they were contemporaneous to its purchases. Although it attempted to use the "settlement price" schedule to prove the price charged, Airweld never showed that the settlement price was ever used to settle accounts. We note further that because Airweld was not a manufacturer, it simply was in no position to swap. It could not offer Airco the same "price" as Liquid Air and Linde because it could not offer large quantities of gas at areas around the

country where Airco did not have a manufacturing plant. It could not, therefore, offer the same consideration as Linde and Liquid Air. For these reasons, we conclude that the district court correctly granted Airco's motion for judgment notwithstanding the verdict on this claim.

V. ATTEMPT TO MONOPOLIZE

The trial court also overturned the jury's finding that Airco attempted to monopolize the cylinder gas market in Portland. Airweld argues that substantial evidence was before the jury from which it could infer that Airco attempted to monopolize the market by trying to squeeze Airweld out of the bulk argon business and by Airco Welding Supply's below cost pricing.

There are three interrelated elements in an attempt to monopolize claim: "(1) a specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive

conduct directly to accomplishing the unlawful purpose; and (3) a dangerous probability of success." William Inglis & Sons Baking Co., 668 F.2d at 1027.

In Inglis, the relationship of these elements was discussed in detail. Id. at 1027-1031. Conduct is the most critical element. Specific intent alone will not support an attempted monopolization claim. Id. at 1028. Predatory or anticompetitive conduct, however, can support an inference of specific intent and dangerous probability of success. Id. at 1028-1029.

Airweld argues that it offered adequate proof of Airco's intent to eliminate it as a competitor as discipline for the decision to terminate the distributorship agreement. In particular, Airweld points to evidence that shows Airco officials intended to "target" Airweld's accounts and to testimony that Airco officials stated Airco would get its

share of the Portland marketplace back "any way it could."

This evidence is slim proof at best of specific intent to "destroy competition." Airco's desire to regain a share of the marketplace, and in so doing reduce Airweld's share, does not show an intent to interfere with the competitive process. As noted in Inglis, the "intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." 668 F.2d at 1028 (footnote omitted).

Our focus, then, must be on the sufficiency of Airweld's proof of unfair or predatory conduct. When, as here, evidence of specific intent is ambiguous, the "plaintiff must introduce evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary." Id. at 1030 (footnote omitted).

> [The conduct] must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. Such conduct is not true competition; it makes sense only because it eliminates competition. It does not enhance the quality or attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront. Its purpose is to create a monopoly by means other than mere competition.

Id. at 1030-1031 (footnote omitted).

Airweld presented evidence which it argued showed that Airco encouraged it to enter the small bulk argon market and then attempted to "squeeze" it out and take over the accounts Airweld had secured. First, we fail to see how this evidence relates to Airweld's claim that Airco attempted to monopolize the cylinder gas market. Bulk argon is not sold in cylinders. This conduct also precedes the general time frame in which Airweld claims the attempt to monopolize occurred.

Second, this is not conduct that amounts to "a substantial claim of restraint of trade" or that is "clearly threatening to competition or clearly exclusionary." Id. at 1030. Airco's price increases in the argon it sold to Airweld were not inherently anticompetitive. Airweld was not, as it seems to assert, locked into buying argon from Airco. After a price increase, Airweld had the right to shop the market to secure a better deal. If Airco failed to meet the lower price, Airweld could purchase from a new supplier.

Airweld also attempted to prove that Airco subsidized the AWS "company" store with up to $500,000 in order to enable it to engage in predatory below-cost pricing. Simply stated, "[p]ricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits."

Id. at 1031 (quoting Janich Bros. v. American Distilling Co., 570 F.2d at 856).

This circuit has approved cost-based methods of determining when a price is predatory:

> Costs are divided into fixed costs (those that do not vary with changes in output) and variable costs (which do so vary). Total cost is the sum of fixed and variable costs. Marginal cost is the increment to total cost that results from producing an additional unit of output. Average cost, or average total cost, is obtained by dividing total cost by output. Likewise, average variable cost is the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1384-1385 (9th Cir.) (footnote omitted), cert. denied, ___ U.S. ___, 104 S.Ct. 370 (1983); see Inglis, 668 F.2d at 1033-1038.

If the plaintiff proves the prices charged by the defendant were below marginal cost or average variable cost, a

prima facie case is made and the burden shifts to the defendant to show "that the prices were justified without regard to any anticipated destructive effect they might have on competitors." Inglis, 668 F.2d at 1036. If the price is above average variable cost, but below average total cost, the burden remains on the plaintiff to otherwise show the predatory nature of the pricing. Id. at 1036. This can be done if the evidence shows "that the defendant sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff." Id.; see Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 888 (9th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1377 (1983). Last, above average total cost pricing will sustain a monopolization claim only if the plaintiff offers "clear and convincing evidence . . . that the defendant's pricing policy was predatory."

Transamerica Computer Co., 698 F.2d at 1388.

At trial, Airweld attempted to prove, through an Airco official's testimony, that 47 of 50 prices offered to 17 Airweld customers were below Airco's average variable cost. On appeal, Airweld contends only that these price quotes were below average total cost. Airco argues that only a few of these price quotes were below average total cost.

Since below average total cost pricing does not prove Airweld's claim, Airweld was required to offer additional proof of anticompetitive conduct. Zoslaw, 693 F.2d at 888. In addition to its cost evidence, Airweld offered evidence to show that price competition was an unnecessary (an impliedly frowned upon) method of entering the Portland market; competition normally occurred in the area of services. The simple reason that most gas distributors in Portland engaged in only limited

price competition does not mean, however, that it was an unfair means of competition for Airco to do so. If we held otherwise, it "would support the perverse rationale that a defendant may not compete by lowering its prices 'if competition would injure its competitors.'" Id. (quoting California Computer Products, Inc. v. IBM Corp., 613 F.2d at 742).

The other examples of anticompetitive conduct relied upon by Airweld do not aid its claim. The argon "squeeze" and targeting of customers have already been discussed. Neither of these practices is inherently anticompetitive.

Airco's conduct is most reasonably understood as a response to market conditions. Once Airweld terminated the distributorship agreement, Airco's presence in the Portland cylinder gas market was lost. In an effort to regain some or part of that market, it charged prices lower than Airweld, who had become

one of its competitors. "[I]f market conditions are such that a course of conduct described by the plaintiff would be unlikely to succeed in monopolizing the market, it is less likely that the defendant actually attempted to monopolize the market." Inglis, 668 F.2d at 1030 (footnote omitted); see Zoslaw, 693 F.2d at 888. This is the situation here. Similarly, even if Airco's prices were below average total cost, this is not the type of conduct "clearly threatening to competition or clearly exclusionary" which a plaintiff must prove in order to show that a firm without market power intended to monopolize the market. See Inglis, 668 F.2d at 1028. As Professors Areeda and Turner discuss, promotional below cost pricing may be a valid means for a firm to attempt to gain entry into a market. III P. Areeda & D. Turner, Antitrust Law, § 716 (1978).

For the foregoing reasons, we affirm the district court's j.n.o.v. on the attempted monopolization claim. Below average total cost pricing, without more, is not the kind of conduct that will support a finding of attempted monopolization by a firm without market power.

VI. CONCLUSION

The judgment of the district court is AFFIRMED.

FOOTNOTES

1. The granting of a motion for new trial is subject to a less stringent standard. The trial court may order a new trial if it believes the jury's verdict is clearly against the weight of the evidence and we may reverse that decision only if we find it to be an abuse of discretion. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 1027 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

2. Airweld claimed that the tying arrangement violated both Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. This court has stated that the elements for establishing a violation under each provision are virtually the same. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977); see In re Data General Corp. Antitrust Litigation, 490 F.Supp. 1089, 1100 (N.D.Cal. 1980) (the distinction has faded beyond recognition). In our analysis, therefore, we treat them alike.

3. Airweld also claims that the jury's verdict in Airweld's favor on the attempt to monopolize the acetylene market claim should still stand. We disagree. Attempt to monopolize will be discussed in more detail later in another context. At this point, we need only state that Airweld's failure to prove a substantive tying violation precludes it from claiming that Airco's actions in that respect also constituted an attempt to

monopolize. See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, (9th Cir. 1983), cert. denied, ___ U.S. ____, 104 S.Ct. 1315 (1984).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AIRWELD, INC.,	)	
	)	
Plaintiff,	)	Civil No. 80-356-RE
	)	
vs.	)	OPINION
	)	
AIRCO, INC.,	)	
	)	
Defendant.	)	
	)	
	)	

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REDDEN, Judge:

Defendant Airco moves for judgment N.O.V. after a jury verdict against it on antitrust claims brought by plaintiff Airweld. I grant the motion on the grounds that the plaintiff's evidence was insufficient to support the verdict. In this opinion, I will briefly recount the relevant facts and law, and then indicate in my discussion of the evidence presented to the jury the crucial gaps in the plaintiff's case.

FACTS

Defendant Airco is a billion-dollar, multinational concern which manufactures gases for industrial use and sells them either to local distributors or directly to large customers. Plaintiff Airweld, which was formerly called Industrial Specialties Co. or ISCO, was the Portland distributor for Airco gases for many years

prior to 1976, when their relationship ended and Airweld became independent.

This case was filed in the Western District of Washington in December of 1979 and transferred to this court where trial commenced in February of 1982. Plaintiff presented evidence for approximately two weeks. Defendant then argued for a directed verdict, and when this was denied, defendant also rested. At the time of the motions I indicated to the parties that I had serious concern about whether plaintiff had sustained its burden, but was submitting it to the jury so that they might affix a damage figure if they ruled in favor of plaintiff. The jury did return a verdict for plaintiff which, after trebling, totaled $1,139,799. This motion followed verdict.

Three of plaintiff's theories, or claims, were submitted to the jury. First, plaintiff claimed that defendant illegally tied the sale of its other gases

to acetylene: i.e., that Airco forced Airweld to buy Airco acetylene in order to be an Airco distributor of other Airco gases. This claim was stated in terms of both an illegal tying arrangement, and an attempt to monopolize the Portland market for gases. For convenience, this first claim will be referred to throughout this opinion as "the acetylene claim."

Plaintiff's second claim was that Airco's participation in "swap agreements" with two other major gas distributors, Linde and Liquid Air, violated the Robinson-Patman Act's proscription of price discrimination, and was an attempt to monopolize. This will be referred to as the "swap" claim.

Plaintiff's third claim was that after Airco and Airweld ended their distribution agreement in 1976, Airco opened a competing Portland subsidiary, Airco Welding Supply or AWS, which used predatory pricing in its efforts to regain

a market share for Airco gases. This will be referred to as the "predatory pricing" claim.

THE STANDARD FOR JUDGMENT N.O.V.

In passing upon a motion for judgment N.O.V., the Court must give appropriate deference to the jury's verdict. The granting of such a motion is only proper "if, without accounting for the credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion -- that the moving party is entitled to judgment notwithstanding the adverse verdict." William Inglis & Sons v. ITT Continental Baking Co., 668 F.2d 1014, 1026 (9th Cir. 1981). The verdict of the jury must stand if it is supported by "substantial evidence." Id.; Marquis v. Chrysler Corp., 577 F.2d 624, 631 (9th Cir. 1978). "Substantial evidence" is

"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 n. 2 (9th Cir. 1977); see also Richardson v. Perales, 402 U.S. 389, 401 (1971). The evidence in the present case fell short of this standard.

THE ACETYLENE CLAIM

A major threat to plaintiff's acetylene claim was the statute of limitations. The customary limitation was tolled by a Federal Trade Commission proceeding, In the Matter of Airco, No. 9098 (1979). It commenced May 19, 1973 and encompassed conduct which dated back almost nine years from the time of this trial's commencement. That conduct was more than six years in the past when the complaint was filed in this action in February of 1979. Plaintiff was required to prove the coercive acts within this expanded limitation period. See Order of August 12,

1980, p. 2 (document #24 in the file of this case).

The plaintiff did establish "substantial evidence" of an illegal tie during the late 1960s. During this period, Airweld sought to build its own acetylene plant but was dissuaded by Airco. A reasonable jury could have found that this was in fact coercion. But there was no substantial evidence of coercion during the required period of the statute of limitations.

The written contract between the parties does not include an illegal tie, and therefore the plaintiff must point to some occasion within the statutory period when coercion might be found by a jury to have occurred. Plaintiff points to a conversation in March 1973, which is outside the limitations period, see transcript at pp. 90-91. No discussion of the issue, which a jury could find to be "coercion," occurred until April of 1975,

after Airweld had cancelled its contract with Airco. Airweld obviously could not be coerced by the threat of contract termination after it had terminated the contract on its own. Plaintiff proved that many conversations on this topic occurred prior to the limitations period, in the late 1960s and in 1971 and 1972. However, there was simply not substantial evidence of a tie during the limitations period. Judgment notwithstanding the verdict will be granted on the acetylene claim.

THE "SWAP AGREEMENT" CLAIM

The three largest firms in the industrial gas field, Linde, Liquid Air and Airco, have national "swap agreements" designed to lower the transportation costs which are so large a part of the cost of industrial gases. This arrangement allows Airco to fill Linde's orders in the areas where Linde does not have its own plant, and Linde reciprocates by delivering gas

to Airco customers in areas where Airco does not have a plant. The arrangement works, obviously, because all the products are gases which are identical in chemical composition and completely indistinguishable by brand name. The long-run goals of the swap arrangement is to have all trades come out even, but the arrangement also provides that, in cases of long-run imbalances, accounts will be settled through the use of a "settlement price." Plaintiff claims that the swaps are illegal under the Robinson-Patman Act's proscription of price discrimination, or under the proscription of an "attempt to monopolize" (the jury rejected the latter argument and therefore it need not be discussed here).

The "swaps" in this case are not subject to suit under the Robinson-Patman Act. There was no evidence that the "settlement price" was in fact the sort of "price" which would be compared to the

higher price charged to Airweld by Airco. There was no evidence that the "settlement price" was in fact ever used by any party to settle accounts. This fact alone would require judgment N.O.V. in this case: plaintiff simply did not prove that others were in fact charged lower prices than those charged to it. However, even if this fact had been proved, the swaps would not have been subject to attack under the Robinson-Patman Act. An inextricable part of the "settlement price" was the fact that each party to the agreement could count on the others to provide reciprocal "swaps" in their market areas. This is why the "settlement price" was so low. The parties to such an agreement could not be required under the Robinson-Pactman Act[1] to give others the settlement price, who could not in fact "swap." In essence, the "swaps" were not sales, but trades -- since Airweld could not trade, because it was in only one market, it sought to

challenge the "swaps" as sales at a price. On this point I adopt the analysis of the Tenth Circuit in American Oil v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975), to the effect that such "swaps" are not "sales' within the ambit of the Robinson-Patman Act. To apply the Robinson-Patman Act blindly to such arrangements would not serve to advance legitimate goals such as the spurring of competition, but would merely preclude such arrangements and the beneficial effects they have in reducing transport costs of fundible commodities.

Judgment N.O.V. shall be entered in favor of the defendant on the "swaps" claim.

PREDATORY PRICING

After Airweld terminated the contract between the parties in 1975, effective in 1976, Airco was without a distributor of its products in the Portland market. In 1976, Airco opened a new subsidiary in Portland, Airco Welding Supplies (AWS),

also called at times throughout the trial, "the company store." AWS tried to attract customers back to Airco products. Airweld claims that AWS used predatory pricing in this effort. The elements of such a claim are three: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." Inglis, supra, at 1027. I adopt the approach in Inglis at 1027-1039 to this difficult issue, and summarize the Inglis approach through the following quotations from that opinion:

> The element of specific intent appears to have had its genesis in the distinctions -- and similarities -- between monopolization and attempted monopolization, both of which are proscribed in separate terms by Section 2. . . . Whatever its origins, the existence of specific intent may be established not only by direct evidence of unlawful design, but [also] by circumstantial evi-

dence, principally of illegal conduct. . . . On the other hand, direct evidence of intent alone, without corroborating evidence of conduct, cannot sustain a claim of attempted monopolization . . .

The third element, dangerous probability of success, like the first, also is rooted in the relationship between the separate offenses of monopolization and attempt to monopolize . . . Although this element is generally treated as separate and independent, it can be inferred from evidence indicating the existence of the other two . . . However, the proper significant of this third element 'has been controversial, even within this circuit.' . . .

The conduct element of the attempt claim is also closely related to the other two elements. . . . But, in general, conduct that will support a claim of attempted monopolization must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. Such conduct is not true competition; it makes sense only because it eliminates competition. . . .

Guided by these principles, we hold that to establish predatory pricing a plaintiff

> must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Inglis, supra, at 1027-1031; 1035-1036 (citations omitted; emphasis added).

There was not "substantial evidence" of predatory pricing in this case. Plaintiff proved only that, of Airweld's 550 customers, AWS approached 17 over a period of four years with prices lower than Airweld's quotes.[2] Airweld then matched these Airco quotes, and the transactions were still profitable ones to

Airweld. This is far from a case where pricing was below average variable cost or average total cost, as Inglis. It appears that the entry of AWS into the Portland market merely reduced Airweld's profit margin on some orders. This is what competition, specifically price competition, is all about.

It is not surprising that AWS's quotes in these 17 instances were below those of Airweld. AWS was a new entrant in the Portland market, with no customers. Airweld held 23% of the Portland market. The only way AWS could enter the market was to compete on the basis of price. Further, Airweld's pricing policy was unusual. Airweld's President, Stan Richardson, believed that companies in the industrial gas field should not compete on price, but on "service." "Service" consisted of the inculcation of customer goodwill through immediate personalized attention, frequent deliveries, and an

intense sales effort. These efforts increased overhead and help explain why Airweld's prices were higher than AWS's and, in general, among the highest in the Portland market. Airweld's sales remained high, however, and the company way, and is, profitable. Airweld earned substantial profits even during the period of alleged "predatory" price cutting by AWS.

This is not substantial evidence of predatory pricing by AWS. This is not a pricing strategy which "makes sense only because it eliminates competition," Inglis, supra, at 1030-1031. This is the very essence of lawful competition. AWS entered a market in which profits were great, and its entry reduced profits to some extent. Indulging all reasonable inferences in favor of the plaintiff, I find the evidence falls short of proving that AWS engaged in predatory pricing rather than lawful competition.

The plaintiff's argument is that the prices quoted were below AWS's average total cost. This is not surprising. As a new entrant with no sales but high overhead, AWS was bound to lose money during its initial months of operation, when its sales volume was still low. Inglis obviously cannot be extended to such a situation, where AWS's prices would have been below average total cost, whatever it charged. A new entrant, in order to compete, must be willing to wait for sales to grow in order to recoup the initial investment. The prices AWS quoted were not so low that they made sense only if AWS's effort was to eliminate competition. In fact, they made more sense as attempts at lawful competition. Further, there was no "dangerous probability of success" in the purported monopolization effort, as is required under the third prong of Inglis. See Id. at 1029. Airweld held 23% of the market. AWS had none of the market and

gradually grew to be a very minor factor in it.[3] The idea that AWS was pricing low in order to monopolize the market, and that this purported scheme had a "dangerous probability of success," is unsupported by substantial evidence.

The defendant's motion for judgment N.O.V. on the predatory pricing claim will be granted.

DATED this 11th day of January, 1983.

JAMES A. REDDEN
United States District Judge

FOOTNOTES

1. My analysis is limited to the Robinson-Patman Act, 15 U.S.C. § 13, and nothing said here should be construed as foreclosing challenges to these arrangements under other appropriate statutes.

2. Plaintiff urged at oral argument that there was more evidence of predatory pricing which had not gone to the jury. This was apparently evidence that some Airweld customers switched to AWS, which plaintiff did not present to the jury because of the "problems of proof." These problems appeared to be the fact that the customers switched, not because of price, but because they liked the AWS salesman better (i.e., "service"). It would obviously be speculation to attempt to say what this "evidence" would have proved. I know of no authority for upholding a jury's verdict based upon evidence which was not presented to the jury.

3. In 1978 Airweld's gas sales were around $3,000,000 and AWS's were around $300,000. Nineteen seventy nine was the year in which AWS first earned a profit. Exhibit 239.

APPENDIX C

SHERMAN ACT

Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or

conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

CLAYTON ACT

Section 3

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale

within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. [15 U.S.C. § 14]

ROBINSON-PATMAN ACT (Amendment to Clayton Act)

(a) That it shall be unlawful for any person engaged in commerce, in the

course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for dif-

ferences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce form

selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [15 U.S.C. § 13(a)]

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affir-

matively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. [15 U.S.C. § 13(b)]

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of a value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction ore to an agent, repre-

sentation, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. [15 U.S.C. § 13(c)]

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the

distribution of such products or commodities. [15 U.S.C. § 13(d)]

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. [15 U.S.C. § 13(e)]

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. [15 U.S.C. § 13(f)]